

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/DTS)

This Document Relates To:
All Actions

**Joint Status Update and Proposed
Agenda for Requested Conference**

In response to the Court's request for a case management plan, the parties' counsel have met and conferred. The parties believe that the first step toward establishing a case management plan to govern future proceedings will be a status conference with the Court. The parties respectfully submit the following Joint Status Update and Proposed Agenda for the Court's consideration.

1. Case Management Conferences

The parties believe that regularly-scheduled monthly status conferences should be scheduled.

2. Administrative Issues and Revisiting Pretrial Orders

The parties jointly request that the District of Minnesota's Bair Hugger MDL website be reactivated providing easy access to the various Pre-Trial Orders, hearing transcripts, and contact information. The parties have identified the following issues related to administration and Pre-Trial Orders:

- a. **Pre-Trial Order No. 3:** Plaintiffs expect to submit an amended PTO regarding Plaintiffs' leadership structure.
- b. **Pre-Trial Order No. 14 – Plaintiff Fact Sheets**

- i. The parties anticipate submitting an amended PTO regarding the electronic service and database of PFSs.
- ii. Resuming PFS Process: The parties agree that new deadlines should be set for submission of PFSs in cases where no PFS has yet been submitted. The parties are in the process of reviewing the status of any challenges to previously submitted PFSs and plan to meet and confer on a timeline and process for resuming any outstanding challenges.
- c. **Pre-Trial Order No. 23:** The parties agree that the substitution requirements set forth on PTO No. 23 will resume as of February 18, 2022. Specifically, within 90 days of a plaintiff's death or February 18, 2022, whichever is later, Plaintiffs shall file suggestions of death.
- d. **Amended Pleadings** – Plaintiffs intend to seek leave to file an amended long form master complaint. 3M's position is that leave of court and a showing of good cause is required prior to the filing of any amended long form complaint to govern this MDL proceedings and request that a briefing schedule be entered upon Plaintiffs' request, at the appropriate time.
- e. Other

3. Update on number and status of cases in MDL

On January 21, 2022, there were 5,262 active federal Bair Hugger cases pending in this MDL.

4. Update on state court cases

There are currently four state court cases:

Petitta v. Ray R. Trey Fulp III D.O., Ray Fulp Orthopedics, P.A. d/b/a South Texas Back Institute and Orthopedics, Javier Barbosa, Javier Barbosa, P.A., VHS Brownsville Hospital Company, LLC d/b/a/ Valley Baptist Medical Center-Brownsville, 3M Company and Arizant Healthcare, Inc.., pending in the District Court of Hidalgo County, Texas. Plaintiff is represented by Albert Garcia, Julian Gomez, Genevieve Zimmerman, Gabriel Assaad, and Kyle Farrar. Defendants 3M and Arizant are presented by David Oliveira, Zandra Foley, and Blackwell Burke P.A. Discovery is underway and trial is set for December 5, 2022.

Katherine O'Haver v. Anesthesia Associates of Kansas City, P.C., Jason Bible, D.O., Charles Herring, CRNA, Centerpoint Orthopedics, LLC, Gregory Ballard, M.D., Centerpoint Medical Center of Independence, LLC, 3M Company, Arizant Healthcare, Inc., Case No. 1816-CV30710, pending in the Circuit Court of Jackson County, Missouri, at Independence. Plaintiff is represented by Brett Emison, Genevieve Zimmerman, Gabriel Assaad, and Kyle Farrar. Defendants 3M and Arizant are represented by Steve Torline and Blackwell Burke P.A. Discovery is underway and depositions are scheduled for January 25 (3M employee witness Al Van Duren); January 27 (Plaintiff); and February 3 (3M corporate representative). Trial is set for September 26, 2022.

Douglas Tye and Bettie Tye v. St. Luke's East Anesthesia Services, P.C., Jonah Garrett, MD, Derek C. Thomas, RN CRNA, Melinda D. Pendergraft, RN CRNA, Jennifer Vansandt, RN CRNA, Rockhill Orthopaedic Specialists, Inc., Wesley F. Frevert, MD, Saint

Luke's East Hospital, 3M Company, Arizant Healthcare, Inc., Case No. 1916-CV00825, pending in the Circuit Court of Jackson County, Missouri, at Independence. Plaintiff is represented by Brett Emison, Genevieve Zimmerman, Gabriel Assaad, and Kyle Farrar. Defendants 3M and Arizant are represented by Steve Torline and Blackwell Burke P.A. Discovery is underway and the depositions are noticed to take place at the same time as in *O'Haver* for Al Van Duren and 3M's corporate representative. Trial is set for April 10, 2023.

Paul Kempker v. Julie Marshall, M.D., Terri Garton, CRNA, Tiffany Tidwell, CRNA, Jill Mellinger, CRNA, 3M Company, Arizant Healthcare, Inc., Case No. 21BA-CV02853, pending in the Circuit Court of Boone County, Missouri. Plaintiff is represented by Brett Emison. Defendants 3M and Arizant are represented by Steve Torline and Blackwell Burke P.A. *Kempker* was filed and served in late 2021. Discovery has not begun and there is no case scheduling order or order setting trial.

5. Update on Canadian action

On June 22, 2016, Defendants were served with a Canadian putative class action, *Driessen v. 3M Canada Company, 3M Company, and Arizant Healthcare Inc.*, filed in Ontario Superior Court of Justice, Court File No. 16-69039. Plaintiff Driessen seeks to represent a putative class of “[a]ll persons residing in Canada who had the 3M Bair Hugger Forced-Air Warming Device used on them during surgery.” (Driessen Cplt. ¶ 4.) Plaintiff Driessen is represented by Jeff Orenstein and Andrea Grass of the Consumer Law Group Professional Corporation in Ottawa, Ontario. Defendants have retained Canadian counsel,

Tim Buckley and Kate Crawford of Borden Ladner Gervais. On August 8, 2016, Defendants filed their Notice of Intent to Defend. There has been no recent case activity.

6. Non-Case Specific Fact and Expert Discovery

a. Plaintiffs' Position: As a preliminary matter, plaintiffs note both parties have an obligation under the Federal Rules of Civil Procedure to supplement responses to all discovery requests. Nearly five years have passed since the close of general causation discovery. Given developments in the literature and indeed, the global pandemic caused by aerosolized pathogens, Plaintiffs submit that 3M should have significant additional documents responsive to discovery requests. Additionally, Plaintiffs note the full scope of the documents produced by 3M encompasses merely 213,076 documents, which is woefully small particularly for a product used in tens of thousands of surgeries every day spanning nearly 30 years. With respect to expert discovery, in an MDL, plaintiffs have the burden of establishing general causation, and subsequently, specific causation. The parties just spent nearly three years obtaining an Order from the Eighth Circuit Court of Appeals confirming plaintiffs' medical and engineering experts have properly admissible opinions on the issue of general causation. Plaintiffs submit this MDL is now at the specific causation phase, and that it is unreasonable to restart with new expert reports on issues relating to general causation.

b. 3M's Position: Non-case specific expert disclosures should be supplemented on issues related to general causation. 3M believes that this targeted supplementation can be accomplished within a 6-9 month timeframe, with Plaintiffs disclosing initial reports and 3M disclosing rebuttals thereafter. 3M disagrees with Plaintiffs' characterization of 3M's document productions in this litigation and disagrees that supplemental responses/documents to all written discovery requests is required or would be appropriate. 3M will meet and confer with Plaintiffs regarding the scope of any supplemental fact discovery related to general causation.

7. Bellwether Trials

- a. Plaintiffs' Position: Plaintiffs are open to discussing with the Court and 3M. At this time, Plaintiffs suggest the Court and the parties work together to design a plan for the remand of waves of cases for case specific discovery and trial in the various transferee courts.
- b. 3M's position: Remand of cases for case specific discovery and trial is premature. Additional bellwether trials are warranted, and additional cases can be trial-ready by early 2023. The parties will need to identify an appropriate set of cases from which to select bellwethers, given lessons learned from the prior rounds of bellwether selection.

8. Pending motions

The Parties plan to review any motions that were fully briefed but not ruled upon, meet and confer on possible resolution, and then identify for the Court any issues that remain.

9. Appeal

3M will file a petition for a writ of certiorari to the United States Supreme Court in *Amador* on or before February 7, 2022

Dated: January 21, 2022

Respectfully submitted,

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